Supreme Court, U.S.
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No. 97-186

In The

Supreme Court of the United States

October Term, 1996

VERN T. WEISS, *et al.*,

Petitioners,

v.

STATE OF ALASKA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Alaska

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does state court approval of a settlement of claims arising out of a federally created trust implicate any federal rights of class members when no adjudication of federal law occurs during the approval process?

2. May dissenting class members claim a violation of due process rights with regard to state court decisions issuing relief which they themselves requested?

LIST OF PARTIES

Petitioners are Vern T. Weiss, father and next friend of Carl Weiss, and Mary Nanuwak.

Respondents in this Opposition to Petition for Writ of *Certiorari* are H.L., M.K., and Alaska Addiction Rehabilitation Services; and Anita Bosel, Frances Doulin, Sharon Goodwin and Gabriel Mayoc.

Other parties to the proceeding are the State of Alaska; and third party intervenors in the case below: Alaska Center for the Environment; Alaska Sportfishing Association, Lynn Canal Conservation, Northern Alaska Environmental Center, Sierra Club, Southeast Alaska Conservation Council, Susitna Valley Association, and Trout Unlimited; Marathon Oil Company and Union Oil Company of California; Usibelli Coal Company; Idemitsu Alaska, Inc.; and John Morris.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

Respondents H.L., M.K., and Alaska Addiction Rehabilitation Services, as well as Respondents Anita Bosel, Frances Doulin, Sharon Goodwin, and Gabriel Mayoc respectfully oppose Petitioners' request for a Writ of *Certiorari*.

OPINIONS BELOW

Weiss v. State of Alaska, 939 P.2d 380 (Alaska 1997)

State of Alaska v. Weiss, 706 P.2d 681 (Alaska 1985)

Weiss v. State of Alaska, No. 4FA-82-2208 Civil (Alaska Superior Ct. Dec. 6, 1994) (order granting final settlement approval)

Weiss v. State of Alaska, No. 4FA-82-2208 Civil (Alaska Superior Ct. July 29, 1994) (order granting preliminary settlement approval)

Weiss v. State of Alaska, No. 4FA-82-2208 Civil (Alaska Superior Ct. April 27, 1988) (order defining beneficiary class)

JURISDICTION

This Court lacks jurisdiction to hear this case as it is a request for review of a twelve-year-old state court decision and the Petition for Writ of *Certiorari* is therefore untimely filed. S. Ct. Rule 13(2); 28 U.S.C. § 2101(c).

STATEMENT OF THE CASE

Petitioners' Statement of the Case is inaccurate and incomplete. Petitioners frequently assert as fact allegations raised in pleadings or self-serving statements made by Petitioners' counsel.[1] Notwithstanding Respondents' obligation to correct these misstatements, an accurate presentation of the complex prior proceedings here is secondary to presenting the clear lack of merit to Petitioners' arguments for *certiorari*. Accordingly, Respondents rely on and incorporate the more accurate and complete statement of the case recited by the trial court below. *See Weiss v. State of Alaska*, No. 4FA-82-2208 Civil (Alaska Superior Court, December 6, 1994); Petition for Writ of *Certiorari*, App. at C 5-29.

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[1] For example, Petitioners characterize the holding in *Weiss v. State of Alaska*, 706 P.2d 681 (Alaska 1985) (hereinafter, *Weiss I*); Petition, App. B, as authorizing the state to "dispose of Trust assets contrary to the best interests of the beneficiaries and owe nothing because it had otherwise funded a mental health program. . . . " Petition at 14. However, no such holding is made. *See Weiss I*, 706 P.2d at 684; Petition, App. B 7-8. Petitioners further state that Respondents were motivated to intervene in the case below because they anticipated "a huge income stream. . . . " Petition at 8. This statement is not supported in the record. Petitioners also describe the settlement below as a "take it or leave it" settlement arising out of "cram down" legislation, citing only to the self-serving affidavits of Petitioners' counsel. The combination of hyperbole and inaccuracy throughout the Petition only misleads the reader.

REASONS FOR DENYING THE WRIT

Petitioners urge the Court to grant *certiorari* because the Alaska Supreme Court violated federal law in approving a settlement arising out of the Alaska Mental Health Enabling Act (hereinafter AMHEA or Enabling Act) and because the settlement approval process failed to protect Petitioners' due process rights. However, Petitioners fail to raise any substantive federal issue for the Court's review. Petitioners further rely on the misleading contention that federal rights were "adjudicated" by the Alaska Supreme Court. *See* Petition at 18. However, no such adjudication occurred in the state court. To the extent that federal issues were at all implicated by the proceedings below, Petitioners have waived any right to seek review. In short, this is a complex and fact specific case with application only to the State of Alaska and which presents no unique or compelling reasons for the Court to grant *certiorari*.

1. The Court Lacks Jurisdiction To Grant Petitioners' Writ

The judgment of the Alaska Supreme Court for which Petitioners seek review, *Weiss v. State of Alaska*, 939 P.2d 380 (Alaska 1997) (hereinafter, *Weiss II*); Petition, App. A, affirmed a trial court's approval of a class action settlement. In this decision, no federal rights were "adjudicated" as Petitioners allege.[2] Rather, the Alaska Supreme

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[2] This is evident from the state supreme court's decision in *Weiss II*. *See Weiss II*, 939 P.2d at 387 n.10 ("In addition, neither the superior court in considering the settlement nor this Court

Court reviewed whether the trial court properly applied the principles of ALASKA R. CIV. P. 23(e)[3] in approving the settlement. *See* Petition, App. at A 12-13.

Each of Petitioners' claimed violations of "federal rights" regarding trust property – *e.g.*, the diminution of the trust's *corpus*; the incorporation of the state's "set-off"; the disallowance of recovery of certain lands – arise from a 1985 Alaska Supreme Court decision. *See Weiss I*, 706 P.2d at 684; Petition, App. at B 8. Specifically, Petitioners' claims largely rest on *Weiss I*'s recognition that if the state were required to reconstitute the AMHEA trust by making cash payments, it may be entitled to a set-off for monies it had already spent on mental health programs. Petitioners concede this by asserting that the unfairness of the settlement approved in *Weiss II* arises from the set-off recognized in *Weiss I*. *See* Petition at 19.

Though in obvious disagreement with this decision now – twelve years after the state court entered its final order – Petitioners never previously sought review to this Court on these matters. Even though *Weiss I* resulted in a remand to reconstitute the AMHEA trust, at that point, the "federal issue was conclusive" and "the outcome of further proceedings preordained", requiring a timely petition to this Court pursuant to 28 U.S.C. § 1257. *Asarco*

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in reviewing it 'decide the merits of the case or resolve unsettled legal questions.' "), *quoting Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). Petition, App. at A 14, n.10.

[3] ALASKA R. CIV. P. 23 is identical to its federal counterpart. Both the Alaska Supreme court and the trial court evaluated the settlement considering factors drawn from federal precedent. *See* Petition, App. at A 13-14; C 37-39.

Inc v. Kadish, 490 U.S. 605, 612 (1989); *see also Cox Broadcasting Corp v. Cohn*, 420 U.S. 469, 479 (1975). The petition for *certiorari* is therefore untimely and this Court lacks jurisdiction to hear it. S. Ct. R. 13(2); *see also* 28 U.S.C. § 2101(c).

2. Petitioners Fail to Raise Substantial Issues of Federal Law

Respondents do not dispute that federal law is implicated in this case. However, to the extent that the Alaska Supreme Court's approval of the settlement in *Weiss II* involves issues arising under the AMHEA, these issues are neither substantial nor compelling questions of federal law. Rather, the federal issues are limited to the Alaska Supreme Court's interpretation of a clearly written federal statute which delegates the determination of proper trust management to the state legislature. *See Weiss II*, 939 P.2d at 392; Petition, App. A 26. Moreover, these issues are attenuated to the primary issue below, *i.e.*, review of a trial court's approval of a negotiated settlement. Petitioners have cited no federal law – case or statute – with which *Weiss II* is in conflict. Indeed, it is not clear what body of law Petitioners seek the Court to apply here. All of this evidences the lack of *any* substantial federal question presented by this case.

Petitioners rely on *Asarco* as justification for granting the writ. *See* Petition at 18. However, any reliance on *Asarco* as evidence of a compelling federal interest in state management of the AMHEA is misguided. The Court's grant of *certiorari* in *Asarco* was not, as Petitioners imply, to protect some general and significant federal interest in

trust land management. Rather, it was to review and refine federal standing and Article III doctrine. *See Asarco*, 490 U.S. at 605-25. The Court reached *Asarco*'s merits not to right an unrecognized or unjust breach of a federal trust, as Petitioners would have the Court believe, but to avoid procedural complications stemming from the jurisdictional analyses which otherwise predominated that decision.

To the extent the Court noted its concern for the trust in *Asarco* at all, it was limited to the specific trust at issue. Herein lies the flaw in Petitioners' argument that "concern for the integrity of the conditions imposed by [the Arizona Enabling Act]" should by implication indicate the Court's concern for AMHEA management. *See* Petition at 18. Petitioners have made no substantive argument as to why the Court's ancillary and specifically tailored interest in *Asarco* should be generalized to embrace the facts presented in *Weiss II*.

Asarco was decided under a unique state enabling act which imposes rigorous and specific obligations upon the trustee state. This enabling act stands alone in this respect. *See Murphy v. State*, 181 P.2d 336, 343-46 (Arizona 1947). It is plainly distinguishable from the AMHEA which imposes no affirmative duties on Alaska regarding the management and disposition of trust lands. The AMHEA provides:

> Such land, income, and proceeds *shall be managed and utilized in such a manner as the Legislature of Alaska may provide*. . . . Such lands . . . may be sold, leased, mortgaged, exchanged, or otherwise disposed of *in such a manner as the Legislature of Alaska may provide*, in order to obtain

> funds or other property to be invested, expended, or used by the Territory of Alaska. AMHEA, § 202(e) (emphasis added).

This language stands in stark contrast to the act analyzed in *Asarco* where Congress provided that granted lands:

> shall be held in trust, to be disposed of in whole or in part *only in the manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions,*. . . . Disposition of any said lands, . . . *in any manner contrary to the provisions of this Act, shall be deemed a breach of trust*. Arizona Enabling Act, ch. 310, § 28, 36 Stat. 557, 574-75 (1910) (emphasis added).

The AMHEA contains no such mandatory language.

Instead of presenting any substantial federal question, *Weiss II* presents the simple issue of interpreting a clearly written statute which delegates to the state significant authority and discretion regarding implementation of the statute's goals. The Court has repeatedly reaffirmed its faith in the ability of state courts to perform such a basic adjudicatory function. *See, e.g., Allen v. McCurry*, 449 U.S. 90, 105 (1980) (Court notes its "emphatic reaffirmation . . . of the constitutional obligation of the state courts to uphold federal law, and its . . . confidence in their ability to do so"); *Huffman v. Pursue*, 420 U.S. 592, 611 (1975) (Court finds that "[a]ppellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities [to uphold federal law]. This we refuse to do".)

Other than their argument based on *Asarco*, it is unclear what specific federal interest Petitioners raise

with respect to trust management. Though Petitioners cite to various state cases enunciating trust principles, *see* Petition at 22-23, they point to no decision of the Court, or any body of federal law, with which *Weiss II* is in conflict.[4] This is so because the issues here are based on the law of trusts, and "[t]here is no free floating federal common law of trusts." *Price v. State of Hawaii*, 921 F.2d 950, 955 (9th Cir 1990), *cert. denied*, 502 U.S. 967 (1991). In the absence of a significant conflict between *Weiss II* and established federal law, Petitioners appear to be asking the Court to create federal common law. Though this is clearly within the Court's power, Petitioners present no compelling argument why the Court should do this now in a case so unique and specific to participants in Alaska's mental health program.[5]

Petitioners make two additional arguments that the *Weiss II* decision is worthy of Supreme Court review: (1) the settlement agreement approved by the Alaska courts was tainted by inadequate class representation; and (2) the Alaska Supreme Court has precipitated a split

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[4] Each of the cases Petitioners cite as indicative of their asserted "uniform authority" are uniformly decided under state enabling acts specific to that state. *See, e.g., City of Sierra Vista v. Babbitt*, 633 P.2d 333, 334 (Ariz. 1987); *Probst v. Nebraska Bd. of Educational Lands*, 55 N.W.2d 653, 657 (Neb. 1952), *cert. denied*, 346 U.S. 823 (1953). These cases are not generally applicable regarding principles of federal trust management, but are applicable only in analyses of the Nebraska and Arizona enabling acts, respectively.

[5] The Court has typically declined such invitations to create federal common law absent any necessity "to protect uniquely federal interests" or to "effectuate Congressional intent." *See generally* Erwin Chemerinsky, Federal Jurisdiction 336 (1994).

between itself and two circuits of the U.S. Court of Appeals. However, Petitioners here once again misstate and overstate their case.

Petitioners' first inadequacy of representation claim is entirely based on the assumption that the trial court's approval of the settlement was premised on the stipulated "set-off" to which the parties agreed thirteen years ago. *See* Petition at 27-28. Leaving aside for a moment that this again is an untimely request for the Court to review the "set-off" discussed in Section 1, *supra*, Petitioners provide no reference or other support for their assumption. That is because there is none. The Alaska Superior Court did not base its decision on this stipulation, but on the Alaska Supreme Court's decision in *Weiss I*.[6] Thus, the basis upon which Petitioners claim a violation of their due process rights finds no support in the record below.

Petitioners also seem to assert that review by the Court is warranted to resolve a conflict between the Alaska Supreme Court and two circuits of the U.S. Court of Appeals. Specifically, Petitioners argue that the Alaska Supreme Court failed to make explicit findings regarding the adequacy of class counsel contrary to *In re: G.M. Pick-Up Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3rd

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[6] This is evident from the trial court's and the Alaska Supreme Court's discussion of the issue. *See* Petition, App. at C 62-63; A 25-27. The doctrine of law of the case required the trial court to adhere to the previous decision in the same case by an appellate court. *See, e.g., Moog v. National Bank of Alaska*, 846 P.2d 806, 810 n.8 (Alaska 1993). Thus, an adequate and independent state ground existed for the trial court to reject Petitioners' claim that the stipulation of former class counsel was improper.

Cir.), *cert. denied*, 116 S.Ct. 88 (1995), and *In re: General Motors Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979). *See* Petition at 29. To illustrate this apparent conflict, Petitioners point to a single footnote in *Weiss II*. However, upon a careful reading of *Weiss II*, the prior state court decisions in this case, and the cases upon which Petitioners rely, it is clear that Petitioners are claiming a conflict where no conflict exists.

Petitioners imply that the Alaska courts made only a cursory inquiry into the adequacy of class representation. This is patently untrue. Prior to granting preliminary approval of the settlement, the trial court conducted extensive evidentiary hearings into Petitioners' claims of collusion (Exc. 688-95; see R. App. 23-30) and found no basis to conclude that the settlement process was in any way corrupted. Furthermore, prior to granting final approval, the trial court assessed the competency of counsel as part of a seven-part analysis of the settlement agreement's fairness, adequacy, and reasonableness. *See* Petition, App. C 37-41. The definition of Petitioners' asserted conflict is even more difficult to discern as this seven-part test significantly parallels the nine-part test relied upon by the Third Circuit. *See In re G.M. Pick-Up*, 55 F.3d at 785. That the specifics of each test may differ is unremarkable, especially where the result is the same: the court made meaningful inquiry into the adequacy of class counsel.

Assuming, *arguendo*, that *Weiss II* did present a conflict with the Third and Seventh Circuits, this would be far from the "perfect opportunity to enunciate a Due

Process standard for the adequacy of class counsel's representation" as Petitioners conclusorily assert. *See* Petition at 29-30. Petitioners give no reason why *Weiss II* presents such an opportunity and none can be found. If the Court found *In re G.M. Pick-Up* undeserving of a grant of *certiorari*, there is little to suggest that this limited, state-based class action decided upon established federal precedent is more deserving of *certiorari* on the grounds Petitioners argue. This is especially so as the Third Circuit decision involved a multi-district, federal class action and the court of appeals outlined and discussed the various circuits' differing standards regarding adequacy of representation. If such a "perfect opportunity" existed for the Court to examine this issue, it was in *In re G.M. Pick-up*, but the Court there declined to do so.

3. Petitioners Have Failed to Preserve Issues Over Which They Now Seek Review

Petitioners assert that their federal rights were violated because *Weiss II* incorporated an improper definition of the trust's beneficiary class which included future mental health program participants who might be added by the legislature. This issue is not ripe for review as the legislature has added no new beneficiaries.

Petitioners also allege that *Weiss II* erroneously permits the mentally retarded and defective to benefit from the trust. However, Petitioners themselves requested this expansion of the class.[7] Accordingly, having sought the

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[7] In 1994, Petitioners requested the trial court to redefine the class to include the mentally defective and retarded. Exc.

very relief at trial over which they claim error on appeal, the doctrine of invited error provided the Alaska Supreme Court adequate and independent state grounds to reject Petitioners' claim. *See* 5 C.J.S. *Appeal* § 745 ("An appellant . . . is estopped, or will not be permitted, to take advantage of errors . . . he has invited or induced the trial court to commit, as where the ruling . . . was made at his request or suggestion."); *see also Barrett v. State*, 772 P.2 559, 568-69 n.10 (Alaska App. 1989) (" 'Invited error' occurs when the court takes erroneous action at the express request of the [appellant], and then the [appellant] urges reversal on that basis. . . . ").

Petitioners further assert their federal rights were violated when the trial court assessed the class' mismanagement claims as speculative. Even if this raised some federal issue, Petitioners themselves advised the class that these claims were dubious. *See* Petition, App. at C 64 n.74.

CONCLUSION

Reduced to its essence, Petitioners' brief presents no more than their disagreement with how the trial court viewed the fairness, reasonableness and adequacy of the

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1165-73. The trial court granted Petitioners' request. In 1992, when endorsing a prior settlement proposal, Petitioners also requested that the class include "other persons needing mental health services as the legislature may properly determine". Exc. 1079-85. Petitioners cannot now petition for *certiorari* claiming federal rights were compromised by the very relief they sought below.

settlement approved in *Weiss II*. Petitioners do not claim that an incorrect rule of law for approval of class actions was applied by the trial court, or Alaska Supreme Court, in derogation of any federal right. Rather, they ask the Court to create new law out of whole cloth. More than twelve years of litigation and settlement attempts transpired between the Alaska Supreme Court's decision in *Weiss I* and its approval of the settlement in *Weiss II*. The labyrinth of proceedings which led to settlement is poor cloth indeed from which to fashion new law and is itself a compelling reason to deny the writ. The settlement approval process in this case was inherently driven by a unique and complex series of facts and events. The underlying law upon which the case is based is singular to beneficiaries of the state mental health program in Alaska. Even were there some wrong for the Court now to correct, it would have no effect beyond the boundaries of the 49th state.

For these reasons, Respondents request the Petition for Writ of *Certiorari* be denied.

Respectfully submitted,

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